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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT:

I. The Due Process Clause of the Fourteenth Amendment Requires that an Arrested Person, Held in Custody, be given a Prompt Judicial Hearing to Determine if Probable Cause Exists to Deprive Him of His Liberty 11

A. The Decisions of This Court Which Prohibit the Taking of Property Without a Prior Hearing, and Prohibit the Taking of Conditional Liberty Absent a Subsequent Hearing, Require That the Taking of Absolute Liberty Be Followed By a Hearing 11

B. The Historical Evolution of the Preliminary Hearing and Its Universal Recognition By All of the States As an Elementary Protection Against Arbitrary Arrest and Imprisonment Supports the Conclusion that Such Hearings Are an Essential Part of Due Process of Law. 15

II. An Information Filed by a State Attorney Cannot Obviate the Right to an Independent Adversarial Determination of Probable Cause. 20

A. The Information Process Provides None Of The Elements Essential To A Due Process Hearing. 20

B. The State Attorney Cannot Be The Neutral and Detached Magistrate Required By The Fourth Amendment. 21

Page

III. The Failure to Accord Preliminary Hearings to all Misdemeanants, Proceeded Against by Information or Not, Violates the Equal Protection and the Due Process Clauses of the Fourteenth Amendment and the Fourth Amendment. 22

IV. The Cases Relied Upon by the State Attorney are not Determinative of This Case. 27

A. *Hurtado v. California*, 110 U.S. 516 (1884) and its Progeny Relate to Preliminary Hearings Prior to Arrest, An Issue Not Presented Here. 27

B. The Several Courts of Appeal Decisions Cited By the State Attorney Are Not Applicable. 30

C. Rule 5(c), Federal Rules of Criminal Procedure and Title 18 U.S.C. §3060(e) Do Not Bar Relief. 31

V. The Judgment of the District Court was a Proper Exercise of Jurisdiction. Neither Abstention, The Anti-Injunction Statute or *Younger v. Harris*, 401 U.S. 37 (1971), Bar Relief in This Case. 32

VI. Providing Preliminary Hearings will Promote the Efficient Administration of Justice. 34

CONCLUSION 35

CERTIFICATE OF SERVICE 36

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972) 26

Armstrong v. Manzo, 380 U.S. 545, 552 (1965) 6, 12, 26

Page

Baugus v. State, 141 So.2d 264 (Fla. 1972) 3

Beck v. Washington, 369 U.S. 541 (1962) 9,27,29,30

Bell v. Burson, 402 U.S. 535 (1971) 6,13

Board of Regents v. Roth, 408 U.S. 564 (1973) 13

Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 13

Coleman v. Alabama, 399 U.S. 1 (1970) 7,19,35

Coolidge v. New Hampshire, 403 U.S. 443 (1970) . . . . . *passim*

Frontiero v. Richardson, __U.S.__, 93 S.Ct. 1764 (1973) 9,24

Fuentes v. Shevin, 407 U.S. 67 (1972) 6,10,12,33

Gagnon v. Scarpelli, __U.S.__, 93 S.Ct. 1756 (1973) . 6,8,15,20

Goldberg v. Kelly, 397 U.S. 254 (1970) 6,8,13,15,20

Grannis v. Ordean, 234 U.S. 385 (1914) 6,8,12,23

Hurtado v. California, 110 U.S. 516 (1884) 9,27,30

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 16,20

Lake Carriers Association v. MacMullan, 406 U.S. 498 (1972) 10,32

Lem Woom v. Oregon, 229 U.S. 586 (1913) 9,27,28,30

McGowan v. Maryland, 366 U.S. 420 (1961) 26

McNabb v. United States, 318 U.S. 332 (1943) 7,29

Meyer v. Nebraska, 262 U.S. 390 (1923) 13

Mitchum v. Foster, 407 U.S. 225 (1972) 10

Morrissey v. Brewer, 408 U.S. 471 (1973) . . . . . *passim*

Murray v. Hoboken Land Co., 59 U.S. (18 Howard) 272 (1855) 7,15

Ocampo v. United States, 234 U.S. 91 (1914) 9,27,29,30

Palko v. Connecticut, 302 U.S. 319 (1937) 16

Pointer v. Texas, 380 U.S. 400 (1965) 7,19

Rochin v. California, 342 U.S. 165 (1952) 7,16

Roe v. Wade, __U.S. __, 93 S.Ct. 705 (1973) 5,8,23,26
Sangaree v. Hamlin, 235 So.2d 729 (Fla. 1970) 3
Shadwick v. City of Tampa, 407 U.S. 345 (1971) 8,22,29
Shapiro v. Thompson, 394 U.S. 618 (1969) 8,23
Sibron v. New York, 392 U.S. 40 (1968) 5
Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969) 6,13
Southern Pacific Terminal Co. v. ICC,, 219 U.S. 498 (1911) 5
Stanley v. Illinois, 405 U.S. 645 (1972) 6,13
State Ex Rel. Hardy v. Blount, 261 So. 2d 172 (Fla. 1972) 3,10,12,33
Twining v. New Jersey, 211 U.S. 78 (1908) 15
Thies v. State, 178 Wis. 98, 189 N.W. 539 (1922) 19
United States v. Burr, 25 Fed. Cas. 2 (C.C.A. Va. 1807) 7,17
Younger v. Harris, 401 U.S. 37 (1971) 10,11,32,33
Widener v. Croft, 184 So. 2d 444 (Fla. 1966) 33
Wisconsin v. Constantineau 400 U.S. 433 (1972) 6,13
Wolf v. Colorado, 338 U.S. 25 (1949) 23

Constitutional Provisions

United States Constitution, Amendment XIV 14

Statutory Provisions

Title 18 U.S.C. §3060(e) 10,31
Title 18 U.S.C. §3146 et seq. 32
Title 28 U.S.C. §2283 10,32
Title 42 U.S.C. §1983 10

Rules

Federal Rules of Criminal Procedure, Rule 5 10,31
Federal Rules of Criminal Procedure, Rule 7 31

Page

Florida Rules of Criminal Procedure, Rule 3.131(a) 5,10,12,22,33
Florida Rules of Criminal Procedure, Rule 3.131(b) 5,12,25
Florida Rules of Criminal Procedure, Rule 3.130(l) 25
Florida Rules of Criminal Procedure, Rule 3.040 25

Other Authorities

41 Am. Jur.2d "Indictments and Informations" (1968) 19
Comment, *The Preliminary Hearing – An Interest Analysis*, 51 Iowa L.Rev. 164 (1965) 16
Comment, *The Preliminary Examination – Evidence and Due Process*, 15 Kan. L.Rev. 374 (1967) 14
Goldfarb, *Ransom*, Harper and Row, New York (1972) 32
Holdsworth, *A History of English Law* (3d Ed. 1945) 7,16
Katz, *Justice is the Crime, Pre-Trial Delay in Felony Cases*, The Press of Case Western Reserve University, Cleveland and London (1972) 2,17,35
Maitland, *The Constitutional History of England* (1911) 17
McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. (1970) 11,34
Paulsen and Kadish, *Criminal Law and Its Processes*, Little Brown and Co. (1962) 34
Plunkett, *A Concise History of the Common Law*, (5th Ed. 1956) 16
Report on Courts, National Advisory Commission on Criminal Justice Standards and Goals, Standard 4.5 (1973) 35
Report on Police, National Advisory Commission on Criminal Justice Standards and Goals, Standard 4.4 (1973) 25

	Page
Scott, *Criminal Law in Colonial Virginia*, Univ. of Chicago Press, Chicago (1930)	7,17
Smith, *Colonial Justice in Western Massachusetts*, Harvard Univ. Press, Boston (1961)	7,17
Stephen, *Select Essays in Anglo-American Legal History*, Vol. 2 (1968)	16
4 Wharton's *Criminal Law and Procedure*, §1731 (1957)	19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Florida is reported at 332 F.Supp. 1107 (S.D. Fla. 1971). The Order adopting a plan to implement the original opinion is reported at 336 F.Supp. 490 (S.D. Fla. 1972). The District Court findings, requested by the Court of Appeals after oral argument are reported at 355 F.Supp. 1286 (S.D. Fla. 1973). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 483 F.2d 778 (5th Cir. 1973).

STATEMENT OF THE CASE

This case focuses upon the question of whether an arrested person, held in custody, has a Fourteenth Amendment due process right to a prompt judicial hearing to determine if probable cause exists to deprive him of his liberty. It also presents the question of whether an information, filed by a State Attorney, obviates that right.

The case does not involve persons arrested upon indictments returned by a grand jury. Therefore the right to a probable cause hearing after indictment is not presented. The Attorney General of Florida, in his amicus curiae brief, has invited this Court to reach that question. He has suggested that there is "no difference in fact or substance" between informations and indictments and that a grand jury is merely the alter ego of a state attorney (Amicus Curiae Brief of the State of Florida, pp. 4-5). That concession may be true. But this case does not require consideration of the problem. Thus the brief deals only with the rights of persons arrested upon some basis other than a grand jury indictment.

It must be emphasized that the respondents do not seek to declare unconstitutional or enjoin the use of informations per se. As a speedy method of screening and initiating charges, the information may be a useful tool.[1] The respondents merely assert that there must be a juducial determination of probable cause even if an information is filed, because a state attorney cannot, consistent with the Fourteenth and Fourth Amendments, determine probable cause in an ex parte proceeding. It is

[1] Katz, *Justice is the Crime, Pretrial Delay in Felony Cases*, The Press of Case Western Reserve University, Cleveland and London (1972), pp. 105-106.

that which the State Attorney has unsuccessfully opposed throughout this litigation.

The petitioners' Statement of the Case is essentially correct. However, a difference in emphasis necessitates a restatement by the respondents.

The case commenced on March 22, 1971 when Robert Pugh and Nathaniel Henderson filed a class action suit in the United States District Court for the Southern District of Florida against various Dade County, Florida public officials, including State Attorney Richard Gerstein. Pugh and Henderson were incarcerated in the Dade County Jail upon informations filed by the State Attorney. They sought a judicial hearing to determine probable cause for their detention (App. 3). Florida law forbade them such a hearing. *Sangaree v. Hamlin*, 235 So.2d 729 (Fla. 1970), *Baugus v. State*, 141 So.2d 264 (Fla. 1962). That rule persists today. Rule 3.131(a), Florida Rules of Criminal Procedure, *State ex. rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).

The plight of Pugh and Henderson was typical. Incarcerated defendants proceeded against by information often waited in jail for a month or more before they were even arraigned. That time was consumed by a process described by James Regan, the Administrative Assistant to the State Attorney (App. 44-60).

Mr. Regan testified that one day to two weeks or more after a police officer made an arrest, the officer would present himself to the State Attorney's office to file an information. (App. 47). Within one to three working days, the assistant state attorney who took the complaint, prepared it, processed it, and then it was signed by the State Attorney or one of his assistants. (App. 50). Thereafter the information was filed with the clerk of the

court, who assigned it to a judge so that the case could be calendared. That process took from one to seven days. (App. 56). On the "average", ten to fifteen days elapsed between the time the complaining party appeared in the State Attorney's office and the defendant appeared in court. (App. 57). Added to that period was the time it took for the complainant to go to the State Attorney's office (one day to two weeks or more [App. 471]). Thus, in excess of a month sometimes passed from arrest to arraignment. During that time no judicial inquiry was conducted to determine if probable cause existed for the person's detention. Indeed, no such opportunity existed until trial.

Some of the charges presented to the State Attorney's office were deficient and he declined to prosecute them (App. 45). Between January 1, 1970 and March 31, 1971, the State Attorney's office determined that 1165 charges were unwarranted and these were "no actioned" (App. 45). The "no actions" occurred only after the complainant (usually police officers) appeared before an assistant state attorney (App. 45).

Upon those facts the District Court issued its original opinion and final judgment declaring unconstitutional the Florida practice of denying a judicial determination of probable cause to persons proceeded against by information (App. 70-87; *Pugh v. Rainwater,* 332 F.Supp. 1107 [1971]). The Court asked for the submission of plans to provide preliminary hearings and adopted the only one suggested, a plan proposed by the Director of Public Safety of Dade County. (App. 88-96; *Pugh v. Rainwater,* 336 F.Supp. 490 [1972]). The State Attorney appealed to the Fifth Circuit.[2]

[2]It is interesting to note that the Attorney General of Florida, who appears here as Amicus Curiae, did not appeal. In fact, the Attorney General, representing several defendant judges, asked that they be permitted to become plaintiffs on the matter of preliminary hearings because they agreed that those hearings were commanded by the Constitution. (App. 63-64; 67).

Shortly thereafter, the judges of Dade County implemented their own plan to provide preliminary hearings for persons not charged by information. The State Attorney of course retained his power under Florida law to obviate the hearings if he chose to file an information.

After oral argument in the Fifth Circuit, the Court of Appeals requested the District Court to review the practices under the system implemented by the judges in Dade County to determine if constitutional infirmities still existed (App. 97-98).

Before the District Court could do that, the Florida Supreme Court promulgated Amended Rules of Criminal Procedure which contained, among other things, many of the requirements set out in the plan which the District Court had previously ordered implemented (App. 101-102). But those Amended Rules once again made clear that persons proceeded against by information filed by the State Attorney were not entitled to a preliminary hearing. Rule 3.131(a), Florida Rules of Criminal Procedure. The Rules totally excluded misdemeanants from preliminary hearings and permitted delayed preliminary hearings for those charged with offenses punishable by death or life imprisonment.[3] Rule 3.131(b), Florida Rules of Criminal Procedure.

[3]Pugh was charged with robbery, an offense punishable by life imprisonment. Henderson was charged with assault and battery, a misdemeanor. Although Pugh and Henderson no longer can benefit from a decision in this case (they have been convicted), a controversy remains because of the class action nature of the suit and the fact that the issue presented is an important constitutional question in the "low visibility" of the criminal process, *Sibron v. New York,* 392 U.S. 40, 52-53 (1968), which is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498 (1911); *Roe v. Wade,* 93 S.Ct. 705, 713 (1973).

The parties stipulated that the District Court re-assessment should also include the effect of the Amended Rules upon the plaintiffs' class (App. 103). After an evidentiary hearing the District Court found once again that permitting the State Attorney to obviate a preliminary hearing violated the Due Process Clause of the Fourteenth Amendment and the Fourth Amendment. The District Court also concluded that the exclusion of misdemeanants and the delayed hearings for capital or life imprisonment offenses ran afoul of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Fourth Amendment (App. 99-114, 115, 355 F.Supp. 1286 [1973]).

The Fifth Circuit affirmed, *Pugh v. Rainwater*, 483 F.2d 778 (1973). This Court granted certiorari.

SUMMARY OF ARGUMENT

I. A. The fundamental requisite of due process of law is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

A due process hearing is required *prior* to the taking of property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). A parolee, or probationer, convicted of a crime, is entitled to a hearing if the state seeks to revoke his conditional liberty. *Morrissey v. Brewer*, 408 U.S. 471 (1973). *Gagnon v. Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756 (1973).

Therefore a person arrested and incarcerated, who is presumed to be innocent, must be accorded a hearing before a judicial officer as soon as possible after his arrest

to determine whether probable cause exists to deprive the arrestee of his absolute liberty. The failure to accord such a hearing deprives a person of liberty without due process of law in violation of the Fourteenth Amendment.

B. The historical evolution of the preliminary hearing process and its nearly universal use by the states supports the proposition that such hearings are required by the Constitution. Due process is an evolving concept. *Rochin v. California*, 342 U.S. 165 (1952). The Court looks to the history of a practice and its utilization to determine its constitutional necessity. *Murray v. Hoboken Land Co.*, 59 U.S. (18 Howard) 272, 276-277 (1855). Preliminary examinations were used in England in the Twelfth Century and codified in the Sixteenth Century. 1 Holdsworth, *A History of English Law* (3d Ed. 1945); *Id.* 4 Holdsworth 529. The practice was followed in America before and after the revolution. Scott, *Criminal Law in Colonial Virginia*, 55-58 Univ. of Chicago Press, Chicago (1930). Smith, *Colonial Justice in Western Massachusetts*, 153-154, Harvard University Press, Boston (1961). In 1807 Chief Justice Marshall conducted the forerunner of the modern preliminary hearing, conducting an inquiry to determine if the charge of treason against Aaron Burr was supported by probable cause. *United States v. Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.A. Va. 1807). Today all states provide for preliminary hearings after arrest (See, *McNabb v. United States*, 318 U.S. 332, 342 (1943) and Appendix, infra). But in Florida, such a hearing is precluded if an information is filed.

This Court has extended the right to counsel and the right to cross examination to preliminary hearings. *Coleman v. Alabama*, 399 U.S. 1 (1970); *Pointer v. Texas*, 380 U.S. 400 (1965). Those rights have no value to a person who is denied the hearing itself. Due process requires that after a person is deprived of his liberty, he must be accorded a preliminary hearing to determine if probable cause exists.

II. A. An information filed by a state attorney cannot obviate the right to a probable cause hearing because the information process provides none of the elements which constitute a due process hearing. A hearing under the due process clause includes the right to notice of the charge, the right to confront and cross examine witnesses, the right to be heard in one's own defense and the right to be heard by a neutral and detached person. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756, 1761-1762 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970). The determination of probable cause made by the process of filing an information contains none of those elements and consequently is violative of the due process clause of the Fourteenth Amendment.

B. The Fourth Amendment commands that probable cause for an arrest be determined by a "neutral and detached" magistrate. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1971). A state attorney, who is a prosecutor, is not a neutral and detached magistrate. *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 453 (1970). Thus the State Attorney cannot be the sole arbiter of probable cause for arrest and detention.

III. The failure to accord preliminary hearings to all incarcerated misdemeanants, proceeded against by information or not, violates the equal protection clause, the due process clause and the Fourth Amendment. The total exclusion of misdemeanants from the opportunity for a preliminary hearing constitutes a classification which is arbitrary, irrational and without any compelling justification. The due process right to be heard is a fundamental right. *Grannis v. Ordean*, 234 U.S. 385 (1914). In order to justify a classification affecting a fundamental right, the state must show a "compelling interest." *Roe v. Wade*, ___ U.S. ___, 93 S.Ct. 705, 728 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The State has not

attempted to show such an interest. Nor has the State presented any rational basis for the classification. Thus under either test for equal protection, the classification imposed upon misdemeanants must fall under the Fourteenth Amendment's prohibition against classifications which cannot be justified. *Frontiero v. Richardson*, ___ U.S. ___, 93 S.Ct. 1764 (1973).

The denial of preliminary hearings to all incarcerated misdemeanants held upon informations or police arrests also violates the due process clause and the Fourth Amendment. *Morrissey v. Brewer*, 408 U.S. 471 (1973), *Coolidge v. New Hampshire*, 403 U.S. 443 (1970).

IV. A. The State Attorney's reliance upon *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom v. Oregon*, 229 U.S. 586 (1913) and *Ocampo v. United States*, 234 U.S. 91 (1914) is misplaced. Those cases permit prosecutions to be initiated by information without *prior* judicial determination of probable cause. Here *subsequent* determinations of probable cause are sought. The State Attorney's attempt to impute approval in *Beck v. Washington*, 369 U.S. 541 (1962), for the denial of subsequent probable cause hearings is without foundation. The issue of probable cause hearings was not present in *Beck*. The Court's comment approving informations filed "without even a prior judicial determination of probable cause" *Id.* 369 U.S. at 545, is merely a reaffirmation of *Ocampo* and *Lem Woom*. In no case has this Court approved the use of an information without a subsequent judicial determination of probable cause.

B. The State Attorney's reliance upon various Courts of Appeal decisions which hold that due process does not mandate preliminary hearings is equally misplaced. (Petitioner's Brief, pp. 16-17). Those cases contend with the argument that an otherwise valid conviction is vitiated by the denial of a preliminary hearing. This case makes no such argument. Thus those cases are not applicable to the limited assertion made here.

C. The fact that an information obviates the right to a preliminary hearing under Rule 5 of the Federal Rules of Criminal Procedure and Title 18 U.S.C. §3060(e) is not determinative of this case. The State and State Attorney erroneously contend that the mere existence of a federal rule and statute supports the maintenance of a constitutionally defective state practice. If the Florida practice does defy the Constitution, then the federal practice would share the infirmity. But even if the constitutional precedent lent itself to application to the federal system, it would have little practical impact because informations have limited use in federal prosecutions. Rule 7(a), Federal Rules of Criminal Procedure.

V. Neither abstention, the anti-injunction statute (Title 28 U.S.C. §2283) or *Younger v. Harris*, 401 U.S. 37 (1971) bar the relief granted by the Court of Appeals. This case presents no question of state law which could be construed by the Florida courts to avoid the federal constitutional issues. Consequently abstention is no bar. *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 511 (1972). Since this is a suit under Title 42 U.S.C. §1983, the anti-injunction statute (Title 28 U.S.C. §2283) is no barrier. *Mitchum v. Foster*, 407 U.S. 225 (1972). The plaintiffs have never sought to interfere with or enjoin any pending or future court proceedings. They seek only a pre-trial procedural right. The granting of such a right does not run afoul of the comity principles of *Younger v. Harris. Cf. Fuentes v. Shevin*, 407 U.S. 67, 71, n. 3 (1971).

Even if *Younger v. Harris* were applicable, this case would be an exception to it. A deprivation of liberty constitutes great and immediate irreparable injury. That injury cannot be redressed in the Florida courts in any proceeding because of their adamant support of the practice which causes the deprivation of liberty. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972), Rule

3.131(a), Florida Rules of Criminal Procedure. Such a situation constitutes an exception to *Younger v. Harris*, 401 U.S. 37, 46 (1972).

VI. Preliminary hearings for all incarcerated arrestees will enhance the administration of criminal justice. In this case, felony caseloads were reduced by twenty to twenty-five percent when preliminary hearings were utilized (App. 109). An American Bar Foundation study estimated that the clearance rate for felonies at the preliminary hearing stage was eighty percent in Chicago and sixty-five percent in Brooklyn, New York. McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1156 (1970). Other studies reflect similar results. Early resolution of felony and misdemeanor charges is promoted by a speedy preliminary hearing offering both sides an opportunity to assess the strength or weakness of the case and agree to a plea. The experience in Dade County, Florida shows that early resolution also reduces costs for jail maintenance (App. 109). Thus providing preliminary hearings will better serve both governmental and private interests.

ARGUMENT

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT AN ARRESTED PERSON, HELD IN CUSTODY, BE GIVEN A PROMPT JUDICIAL HEARING TO DETERMINE IF PROBABLE CAUSE EXISTS TO DEPRIVE HIM OF HIS LIBERTY.

A. The Decisions of This Court Which Prohibit the Taking of Property Without a Prior Hearing, and Prohibit the Taking of Conditional Liberty Absent a Subsequent Hearing, Require That the Taking of Absolute Liberty Be Followed By a Hearing.

Florida law denies preliminary hearings after arrest to persons proceeded against by an information filed by a

state attorney. Rule 3.131(a), Florida Rules of Criminal Procedure, *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).[4] All misdemeanants, no matter how their prosecution is begun, are denied preliminary hearings. Rule 3.131(a), Florida Rules of Criminal Procedure.[5]

The Fourteenth Amendment provides that no state shall ". . . deprive any person of life, liberty, or property, without due process of law . . ." In *Armstrong v. Manzo*, 380 U.S. 545 (1965) this Court wrote:

> A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.
>
> *Id.* 380 U.S. at 552.

[4] That decision leaves no doubt that the prosecutor alone can determine probable cause without any hearing:

> When a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial.
>
> *State ex rel. Hardy v. Blount*, 261 So.2d at 174.

On February 4, 1974, the Florida Supreme Court amended Rule 3.131(b) of the Florida Rules of Criminal Procedure, extending the time for a state attorney to file an information and determine probable cause so that he would be better able to prevent preliminary hearings (Appendix to Brief, p. 4). If the prosecutor does not file an information in time to deprive a person of a preliminary hearing, and a judicial officer conducts one and finds no probable cause, the State Attorney can overrule that decision:

> . . . even if a defendant were granted a preliminary hearing and the committing magistrate discharged the defendant for lack of probable cause, the prosecuting attorney could nevertheless determine that probable cause exists and file an information charging the defendant with the commission of the offense.
>
> *State ex rel. Hardy v. Blount*, 261 So.2d at 174.

[5] The Rule supercedes Florida Statutes §§901.06 and 901.23 which required all persons arrested with or without a warrant to be brought before a magistrate. Those statutes were repealed. 2 West's Florida Session Laws, 1973, Chap. 73-27. Consequently Rule 3.131(a) and *State ex rel Hardy v. Blount* form the foundation of this controversy.

Due process has been held to require a hearing *prior* to the taking of one's property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969).

The hearing sought in this case is a *subsequent* one: a probable cause determination made promptly after arrest. That request is consistent with the concept of flexibility inherent in due process.

> Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.
>
> *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

The government function involved here is the State's duty to charge and arrest persons suspected of the commission of a crime. An adversary hearing prior to the exercise of that function might undermine the State's ability to apprehend a suspect. The accommodation which the plaintiffs urge—a prompt hearing subsequent to arrest—protects the government interest and the private interest, the fundamental right to absolute liberty.[6]

[6] There can be no quarrel over the essential nature of that right under the Constitution. In *Board of Regents v. Roth*, 408 U.S. 564 (1973) the Court, speaking of the liberty guaranteed by the Fourthteenth Amendment, wrote:

> Without doubt, it denotes . . . freedom from bodily restraint. *Id.* 408 U.S. at 572, quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Recently the Court has mandated similar hearings for persons whose liberty, because of conviction for a crime, was conditional. In *Morrissey v. Brewer*, 408 U.S. 471 (1972) the Court stated:

> We see therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege'. By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.
> *Id.* 408 U.S. at 482.

The Court provided the protection by requiring a rapid hearing:

> . . . due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. *Cf. Hyser v. Reed*, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. *Cf. Goldberg v. Kelly*, 397 U.S. at 267-271.
> *Id.* 408 U.S. at 485.

Gagnon v. Scarpelli, ___ U.S. ___, 93 S.Ct. 1756, 1759-1760 (1973) accorded similar protection to the termination of the conditional freedom of probationers.

Persons arrested and detained upon a police officer's suspicion of probable cause and a state attorney's information are deprived of their absolute right to liberty. They are presumed to be innocent. Due process compels the conclusion that they are entitled to a hearing after arrest to determine whether they have committed acts which justify the taking of their liberty.

The Amicus Curiae Brief of the Attorney General misapprehends the right respondents seek to protect. The Attorney General contends that the Florida Rules of Criminal Procedure which permit pre-trial discovery and require a speedy trial guard the rights of a defendant. But it is not the right to a fair or speedy trial which is lost by the denial of a preliminary hearing. It is the right to liberty for those improperly incarcerated which is irretrievably denied. It is small consolation for an innocent jailee that his lawyer may take depositions or that he must be tried within 60 days. One commentator has said:

> Although the preliminary examination is not a trial in the ordinary sense, it can have a profound effect on the individual involved. While being bound over for trial is often regarded as insignificant by judges and writers, it may result in three to six months incarceration, the degradation and expense of a criminal trial and irreparable harm to the accused's reputation, regardless of the ultimate outcome at the subsequent trial. Comment, *The Preliminary Examination-Evidence and Due Process*, 15 Kan. L. Rev. 374-376 (1967) (footnotes omitted).

B. The Historical Evolution of the Preliminary Hearing and Its Universal Recognition By All of the States As an Elementary Protection Against Arbitrary Arrest and Imprisonment Supports the Conclusion That Such Hearings Are an Essential Part of Due Process of Law.

This Court has long held that in determining whether a given procedure is an essential part of due process of law, it must look to the historical development of the procedure both in England and America. *Murray v. Hoboken Land Co.*, 59 U.S. (18 Howard) 272, 276-277 (1855); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908). Due process by its very nature is an evolving concept which cannot be fixed in the confines of a single formula

and expresses in its deepest sense our civilization's revulsion against arbitrary governmental action. *Rochin v. California*, 342 U.S. 165 (1952); *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring); *Palko v. Connecticut*, 302 U.S. 319 (1937).

The practice of according prompt preliminary hearings to persons accused of crime has a long history. Indeed, "the preliminary hearing is an ancient institution," *Coleman v. Alabama*, 399 U.S. 1, 22 (Burger, C.J., dissenting) with roots in the common law. It was first used in England by the Crown's coronors, probably as early as the Twelfth Century, to conduct inquests into unnatural deaths. Comment, "The Preliminary Hearing – An Interest Analysis", 51 Iowa L. Rev. 64, 65 (1965); 1 Holdsworth, *A History of English Law* 82-85 (3d Ed. 1945).[7] In 1554 and 1555 Parliament passed the Statutes of Philip and Mary which required coronors and justices of the peace to conduct preliminary examinations in all felony cases. 1 Holdsworth 84; 4 Holdsworth 296. It is probable that these statutes gave legal sanction to practices which existed earlier without express statutory authority. Stephen, "Criminal Procedure From the Thirteenth to the Eighteenth Century" Vol. 2 *Select Essays in Anglo-American Legal History*, 459 (1968).

Although these early preliminary examinations were inquisitional in nature patterned after continental practices, 1 Holdsworth 296; 4 Holdsworth 528-529, they contained some of the characteristics of the modern preliminary hearing. Witnesses were required to appear before the magistrate to give testimony under oath which was later reduced to writing. Plunkett, *A Concise History of the Common Law* 432 (5th Ed. 1956). If a sufficient case was developed at the examination, the accused and witnesses were bound over for trial. 1 Holdsworth 84-85,

[7] Cited hereafter as "Holdsworth".

296, otherwise the case presumably ended. The magistrate's preliminary examination was designed to check various abuses of governmental power by the local sheriff, whose power the Crown viewed with suspicion.[8]

Gradually, with the development of a professional police force, the preliminary hearing evolved into an impartial, judicial inquiry. The magistrate became neutral and detached from the prosecution. The accused was accorded the rights of counsel, privilege against self-incrimination and compulsory process of witnesses. The function of the magistrate was no longer to investigate crime, but to impartially determine whether the prosecution had developed sufficient evidence against the accused to warrant a trial. 1 Holdsworth 296-297.

The basic preliminary hearing practice of England was followed in America both before and after the Revolution. Scott, *Criminal Law in Colonial Virginia* 55-58 Univ. of Chicago Press, Chicago (1930); Smith, *Colonial Justice in Western Massachusetts* 153-154, Harvard Univ. Press, Boston (1961). In 1807 Chief Justice John Marshall conducted the equivalent of a modern preliminary hearing on charges of treason against Aaron Burr. *United States v. Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.A. Va. 1807). Marshall delivered an opinion which established the prevailing law in America on preliminary hearings:

> On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in

[8] Katz, *Justice is The Crime – Pre-Trial Delay in Felony Cases*, 22-23, The Press of Case Western Reserve, London and Cleveland (1972). In the Twelfth Century the sheriff was "little less than a provincial viceroy" controlling all police, justice, fiscal and military matters in his local district. Maitland, *The Constitutional History of England* 232-233 (1911). The magistrates supplanted the sheriff's functions relating to arrest, bail and trial of accused persons. *Id.* 232.

chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused: but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it. I think this opinion entirely reconcilable with that quoted from Judge Blackstone. When that learned and accurate commentator says, that 'if upon an inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him, otherwise he must be committed to prison or give bail,' I do not understand him as meaning to say that the hand of malignity may grasp any individual against whom its hate may be directed, or whom it may capriciously seize, charge him with some secret crime, and put him on the proof of his innocence. But I understand that the foundation of the proceeding must be a probable cause to believe there is guilt; which probable cause is only to be done away in the manner stated by Blackstone. The total failure of proof on the part of the accuser would be considered by that writer as being in itself a legal manifestation of the innocence of the accused. In inquiring, therefore, into the charges exhibited against Aaron Burr, I hold myself bound to consider how far those charges are supported by probable cause.

Today every state has rules, statutes or constitutional provisions which contemplate preliminary hearings.[9] In most of the states which authorize prosecutions by information, the prosecuting attorney may file an information "only after the defendant has been accorded the

[9]The Appendix to this Brief contains a state by state analysis of those provisions.

right to a preliminary examination, unless he waives such examination and then only when he has been held for trial. . . ." 4 Wharton's *Criminal Law and Procedure* §1731, p. 517 (Anderson 1957); 41 Am.Jur.2d "Indictments and Informations" §20, p. 892 (1968). Florida, and a few other states[10] permit an information to vitiate the right to a preliminary hearing.

That practice emasculates the historic reason for the hearing:

> The object or purpose of the preliminary [hearing] is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.
>
> *Thies v. State*, 178 Wis. 98, 189 N.W. 539, 541 (1922).

This Court has recognized the critical nature of preliminary hearings. Defendants facing such hearings have been guaranteed the right to confront and cross examine witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965), and the right to counsel, *Coleman v. Alabama*, 399 U.S. 1 (1970). Those rights have no meaning to a person denied the hearing itself.

Mr. Justice Frankfurter wrote:

> 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been

[10]According to Petitioners' Brief: Connecticut, Arkansas, Wyoming, Montana, Iowa and Washington share the Florida practice. (Brief of Petitioner, pp. 13-14).

> evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring).

The right to a prompt preliminary hearing after arrest fits securely into due process of law.

II.

AN INFORMATION FILED BY A STATE ATTORNEY CANNOT OBVIATE THE RIGHT TO AN INDEPENDENT ADVERSARIAL DETERMINATION OF PROBABLE CAUSE.

A. The Information Process Provides None of the Elements Essential to a Due Process Hearing.

At the least, the minimum requirements of a due process hearing are: (1) written notice of the charges; (2) an opportunity to confront and cross examine adverse witnesses; (3) the right to be heard and to present witnesses and documentary evidence; and (4) the right to have a neutral and detached person determine the question of probable cause. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756, 1761-1762 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970). The information process provides none of these safeguards. The administrative officer for the State Attorney described the method (App. 44-59). It is wholly ex-parte. The arrestee has no role at all in the proceedings which affect his liberty.

Moreover, a finding of probable cause by the State Attorney cannot comport with the due process clause, because the State Attorney is not a "neutral and detached" person. In *Morrissey* the Court commented:

> In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case.
> *Id.* 408 U.S. at 485.

The State Attorney is the chief prosecuting official. It cannot be said that he meets the due process standard set in *Morrissey*. That becomes plain when one considers the requirement of neutrality and detachment embodied in the Fourth Amendment.

B. The State Attorney Cannot Be the Neutral and Detached Magistrate Required by the Fourth Amendment.

The Fourth Amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1970) this Court held that the Attorney General of New Hampshire could not be a neutral and detached person who would be permitted to authorize the issuance of a warrant for a Fourth Amendment search and seizure:

> We find no escape from the conclusion that the seizure and search . . . cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all.
> *Id.* 403 U.S. at 453.

A warrant for an arrest requires the same degree of neutrality and detachment. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1971).[11]

The State Attorney, very properly, does not attempt to distinguish his situation from the "neutral and detached" rules enunciated in *Coolidge*, *Shadwick* (or *Morrissey*). He is the chief prosecutorial official and therefore he cannot, consistent with the Fourth Amendment, be the sole arbiter of probable cause, prior to or subsequent to an arrest.

III.

THE FAILURE TO ACCORD PRELIMINARY HEARINGS TO ALL MISDEMEANANTS, PROCEEDED AGAINST BY INFORMATION OR NOT, VIOLATES THE EQUAL PROTECTION AND THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AND THE FOURTH AMENDMENT.

The Florida Rules of Criminal Procedure (Rule 3.131(a)) deny a preliminary hearing to arrested misdemeanants, no matter how their prosecution is instituted. Those persons suffer the same due process deprivation as persons charged with felonies. They are deprived of their liberty without an opportunity to be heard. If

[11]The rationale of *Shadwick* underlines the Fourteenth Amendment due process nature of this case. *Shadwick* held, on Fourth Amendment grounds, that a municipal court clerk was a neutral and detached person who could issue an arrest warrant. A decision here, based on the Fourth Amendment only, would permit a State Attorney to file an information and have a neutral and detached court clerk, or a judge, issue an arrest warrant. The question of what is due after arrest would be left unanswered. But it is that issue, the right to be heard after arrest, which is the core of this case. That is a due process matter.

charged by information, the Fourth Amendment violation also occurs.[12]

The right to be heard is a fundamental right, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), especially when one is being deprived of liberty. The guarantees of the Fourth Amendment are fundamental rights. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' ". *Roe v. Wade*, ___U.S.___, 93 S.Ct. 705, 728 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Neither the State Attorney or the Attorney General, in their briefs, contend that any state interest is protected by the total exclusion of misdemeanants.[13] Originally, in the District Court, the State Attorney argued that a fair trial problem could be created if the magistrate determining probable cause in a misdemeanant's case had the same case assigned to him for trial. The Fifth Circuit response to that concern was succinct:

> The answer to this is not the denial of preliminary hearings, but the development of a system whereby judges are rotated to prevent such overlap. Indeed,

[12]The due process and Fourth Amendment discussions in Points I and II apply with equal force to this point. They will not be repeated since this argument focuses upon equal protection.

[13]Another classification, delayed hearings for persons charged with capital offenses or offenses punishable by life imprisonment, was never rationalized by the State Attorney or the State, nor alluded to in their briefs in this Court. The classification was struck as violative of equal protection by the District Court (App. 110-111, *Pugh v. Rainwater*, 355 F.Supp. at 1291-1292) and the Court of Appeals. *Pugh v. Rainwater*, 483 F.2d at 789-790. The point is not argued in this brief since the petitioner and the Amicus Curiae appear to accept the parity ordered below, if preliminary hearings are required.

> the Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit has already testified that preliminary hearings and misdemeanor trials are currently conducted by separate panels of judges in Dade County.
>
> *Pugh v. Rainwater*, 483 F.2d at 789.

The Court of Appeals also addressed the State's concern for the cost of providing preliminary hearings for misdemeanants. It found ample support for the District Court's finding that any increased costs would not be significant:

> The number of misdemeanor cases involving no pretrial incarceration and requiring no preliminary hearings comprised the bulk of all misdemeanors. Moreover, experience from the felony hearing system showed a reduction in felony caseloads and a savings to the taxpayers of the county.
>
> *Pugh v. Rainwater*, 483 F.2d at 789. (footnote omitted)

Even if there were some basis for the State's concerns, this Court has said:

> In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency. . . . And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.
>
> *Frontiero v. Richardson*, ___U.S.___, 93 S.Ct. 1764, 1772 (1973) (citations omitted).

Actually, providing jailed misdemeanants with preliminary hearings will promote speed and efficiency in the administration of criminal justice. Persons who should not be detained will be released, saving future court and police time. Pleas accepted at the preliminary hearing would result in similar savings.

Beyond that, the availability of such a hearing for incarcerated defendants would encourage pre-trial release of those persons, and relieve overcrowded jails.[14] It would also motivate courts to provide speedy trials for misdemeanants, promptly determining guilt or innocence, instead of probable cause. In Dade County, Florida, that result has already been achieved.[15]

Most misdemeanors arrests do not contemplate jail pending trial. Florida provides for the use of a summons in lieu of arrest and booking in misdemeanor cases. Florida Statutes § 901.09; Rule 3.130(l) Florida Rules of Criminal Procedure. That method is rapidly gaining nationwide support. *Report on Police*, National Advisory Commission on Criminal Justice Standards and Goals,

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[14]The Director of the Dade County Jail testified that the majority of the 500 persons in his jail were awaiting trial and remained in custody because they were unable to post pre-trial monetary bond. (Deposition of Jack C. Sandstrom, reflected in the Record on Appeal, pages 305-314. See especially pages 308-312). The question of the constitutionality of money bail as applied to indigents was raised in the original complaint filed by Pugh, Henderson and two intervening plaintiffs. The District Court denied relief on that claim and a separate appeal was taken by the plaintiffs. That case, *Pugh v. Rainwater*, Fifth Circuit No. 72-1223, has not been decided.

[15]The State Attorney's Brief, at page 18, states:

> . . . most misdemeanants in Dade County, Florida have disposition of their cases on the merits in a shorter time than they could be accorded a preliminary hearing under the rules now in effect.

Those rules, Florida Rules of Criminal Procedure, Rule 3.131(b), as amended February 4, 1974, tolerate a five day lapse between arrest and preliminary hearing in felony cases. (The first appearance hearing is required within 24 hours of arrest, Rule 3.130(b), and the preliminary hearing 96 hours or four days later, unless an information is filed.) Actually the rules may condone a seven day lapse because Rule 3.040 excludes Saturdays, Sundays and holidays in the computation. The Court of Appeals refrained from deciding

Standard 4.4 "Citation and Release on Own Recognizance." (1973)[16]

Thus, an analysis of the competing interests involved in the classification which excludes misdemeanants compels only one conclusion: neither a compelling state interest or a rational basis exist to justify the classification. Under the strict equal protection test, *Roe v. Wade*, ___ U.S. ___, 93 S.Ct. 705, 728 (1973), or the relaxed standard *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961), the total exclusion of incarcerated misdemeanants from preliminary hearings must fall.

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the delay the Constitution might permit. *Pugh v. Rainwater*, 483 F.2d at 788. Respondents unsuccessfully cross-petitioned for certiorari on that point 42 L.W. 3325 (December 3, 1973, Justice Douglas dissenting). While not attempting to circumvent the Court's denial, respondents respectfully submit that the question of when a hearing is required by due process is a legitimate one. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A week of incarceration absent a hearing is too long, especially in light of *Argersinger v. Hamlin*, 407 U.S. 25 (1972) which precludes a loss of liberty for one day absent counsel. For totally excluded misdemeanants, *Argersinger* presents a compelling argument. It seems constitutionally incongruous to prohibit one day of incarceration after trial unless counsel is provided or properly waived but on the other hand, permit lengthy pre-trial incarceration without a hearing.

[16]The limited impact of giving jailed misdemeanants preliminary hearings is supported by a footnote in *Argersinger v. Hamlin*, 407 U.S. 25, 38 n. 10 (1972) reflecting that of 1,288,975 people convicted in the City of New York in 1970 for minor offenses, only 24 were incarcerated. With such small numbers being jailed after trial, it seems clear that the number of minor offenders suffering incarceration prior to trial must be *de minimus* in nearly all jurisdictions.

Another alternative to providing preliminary hearings to misdemeanants is suggested by the American Bar Association Special Committee on Crime Prevention and Control: take various types of conduct out of the court system. *Argersinger v. Hamlin*, 407 U.S. 25, 38 n. 9 (1972).

IV.

THE CASES RELIED UPON BY THE STATE ATTORNEY ARE NOT DETERMINATIVE OF THIS CASE.

A. *Hurtado v. California*, 110 U.S. 516 (1884) and Its Progeny Relate to Preliminary Hearings Prior to Arrest, An Issue Not Presented Here.

Throughout this litigation the State Attorney has maintained that *Hurtado v. California*, 110 U.S. 516 (1884), *Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914) and *Beck v. Washington*, 369 U.S. 541 (1962) justify the denial of preliminary hearings. Both the District Court and the Fifth Circuit examined those cases and concluded that they permitted informations without *prior* judicial determinations of probable cause and found them not determinative of the right to *subsequent* determinations of probable cause.

Hurtado v. California, 110 U.S. 516 (1884) permitted the use of an information instead of an indictment as a method for initiating prosecutions. But the process which was approved provided for a preliminary hearing *prior* to the information:

> We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, *after examination and committment by a magistrate, certifying to the probable guilt of the defendant*, with the right on his part to the aid of counsel, and to the cross examination of the witnesses produced for the prosecution, is not due process of law.
>
> *Id.* 110 U.S. at 538 (Emphasis supplied.)

The respondents do not object to an information *after* a preliminary hearing if probable cause is found. The information in that situation is merely a charging document based upon an independent determination of prob-

able cause. It is an information which is neither preceeded nor followed by an independent determination of probable cause which runs afoul of the Constitution. Thus, *Hurtado* is not inconsistent with the contentions advanced here.

Lem Woom v. Oregon, 229 U.S. 586 (1913) allowed the state to use an information where:

> The Constitution and laws of Oregon . . . did not require any examination by a magistrate as a condition *precedent* to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath.
> *Id.* 229 U.S. at 587 (Emphasis supplied.)

The Court held that there was no requirement for a judicial examination "*prior* to the formal accusation by the district attorney" *Id.* 229 U.S. at 590 (Emphasis supplied). The right to a preliminary hearing as a condition subsequent was not addressed.

In *Ocampo v. United States*, 234 U.S. 91 (1934) the defendants sought to vacate an order of arrest, and invalidate their subsequent conviction at trial:

> . . . upon the ground that it [the arrest] was made without any preliminary investigation held by the court and without any tribunal, magistrate, or other competent authority *having first determined* that the alleged crime had been committed, and that there was *probable cause* to believe the defendants guilty of it . . .
> *Id.* 234 U.S. at 93 (Emphasis supplied).

The Court found that there was no need for investigation by a judicial officer *prior* to arrest:

> . . . the function of determining that probable cause exists *for the arrest* of a person accused is only quasi judicial and not such that because of its nature it must necessarily be confided to a strictly judicial officer or tribunal.
> *Id.* 234 U.S. at 100 (Emphasis supplied).

That statement is wholly consistent with *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), which empowered a municipal court clerk to determine probable cause for arrest.

Although the prosecuting attorney in *Ocampo* determined that an offense may have been committed, his information and supporting affidavit were "made before the judge of the court of first instance, *who thereupon issued warrants of arrest.*" Id. 234 U.S. at 93 (Emphasis supplied). Thus, a neutral and detached person stood between the prosecutor and the defendant. Any other method, even prior to arrest, would deviate from *Coolidge v. New Hampshire*, 403 U.S. 433 (1970) and *Shadwick v. City of Tampa*, 407 U.S. 345 (1971). See also *McNabb v. United States*, 318 U.S. 332 (1942).[17]

Beck v. Washington, 369 U.S. 541 (1962), as the Court below stated, adds nothing to *Ocampo*. The State Attorney seeks to impute approval for his practice by reading new meaning into the Court's comment that since Washington abandoned its mandatory grand jury practice:

> . . . prosecutions have been instituted on informations filed by the prosecutor without even a prior judicial determination of 'probable cause'–a pro-

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[17] "The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must, with reasonable promptness, show legal cause for detaining arrested persons, constitutes an important safeguard–not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society."
McNabb v. United States, 318 U.S. 332, 343-344 (1942).

> cedure which has likewise had approval here in such cases as *Ocampo v. United States* . . . and *Lem Woom v. Oregon* . . . .
>
> *Id.* 369 U.S. 546.

The State Attorney maintains that the Court was "certainly aware" that Washington law did not require subsequent judicial determinations of probable cause (Petitioners' Brief, page 13). But *Beck* did not present the issue of probable cause hearings. The speculative assertion made by the State Attorney simply has no foundation. *Beck* is merely a reaffirmation of *Ocampo.*

Whatever the application of *Hurtado, Lem Woom* and *Ocampo,* they share one characteristic with the several Courts of Appeal decisions which the State Attorney urges in support of his argument. They all attempted to reverse otherwise valid convictions because of the denial of a preliminary hearing. No such attempt is made here, and that fact distinguishes all of the cases cited by the State Attorney.

B. The Several Courts of Appeal Decisions Cited By the State Attorney Are Not Applicable.

The State Attorney refers to several Courts of Appeal decisions which hold that preliminary hearings are not required by the Due Process Clause.[18] Each of those cases involved a defendant who was seeking to overturn his

[18] *Scarborough v. Dutton,* 393 F.2d 6 (5th Cir. 1968); *Kerr v. Dutton,* 393 F.2d 79 (2d Cir. 1968); *Sciortino v. Zampano,* 385 F.2d 132 (3d Cir. 1969); *Rivera v. Gov't of the Virgin Islands,* 375 F.2d 988 (4th Cir. 1967); *Barber v. U.S.,* 142 F.2d 805 (6th Cir. 1944); *U.S. v. Luxenberg,* 374 F.2d 241 (7th Cir. 1967); *Weber v. Ragen,* 176 F.2d 579 (8th Cir. 1949); *U.S. v. Gross,* 416 F.2d 1205 (9th Cir. 1969); *Austin v. U.S.,* 408 F.2d 808 (10th Cir. 1969); and *Swingle v. U.S.,* 389 F.2d 220 (D.C. Cir. 1968). The cases involving federal defendants arose out of indictments and are doubly inapplicable.

otherwise valid conviction because of the denial of a preliminary hearing. That relief is not sought here.

Those cases are grounded upon the sound theory that a fair trial is possible without a preliminary hearing. The question presented here is whether a pre-trial deprivation of liberty is fair without a preliminary hearing. The Fifth Circuit concluded:

> The distinction between a pretrial declaration of a right to a hearing and a post conviction appeal for reversal on the basis of the absence of such a hearing is a pragmatic and sensible distinction.
>
> *Pugh v. Rainwater,* 483 F.2d at 787.

The Courts of Appeal cases did not consider the right to a preliminary hearing in the context presented here. Therefore those decisions are not dispositive of the claims before this Court.

C. Rule 5(c), Federal Rules of Criminal Procedure And Title 18 U.S.C. §3060(e) Do Not Bar Relief.

Rule 5(c), Federal Rules of Criminal Procedure and Title 18 U.S.C. §3060(e) disallow preliminary hearings if an information is filed prior to the hearing date. It is argued that the existence of those provisions supports the constitutional validity of the practices under scrutiny here. The respondents respectfully submit that no such conclusion can be drawn. The federal information provision has never been questioned in this Court on analogous Fifth and Fourth Amendment grounds. In the absence of such an inquiry, it cannot be said that §3060(e) and Rule 5(c) govern the constitutional issues in the instant matter.

As a practical matter, the federal practice would be minimally affected by affirmance in this case. Under Rule 7(a), Federal Rules of Criminal Procedure, informations may be used only in misdemeanor cases, unless a felony defendant waives indictment. Misdemeanants generally

secure pre-trial release in the federal system, pursuant to the Bail Reform Act (Title 18 U.S.C. §3146 et. seq). In the state system, pre-trial detention is widespread[19] and preliminary hearings would have a more important impact.

V.

THE JUDGMENT OF THE DISTRICT COURT WAS A PROPER EXERCISE OF JURISDICTION. NEITHER ABSTENTION, THE ANTI-INJUNCTION STATUTE OR *YOUNGER v. HARRIS*, 401 U.S. 37 (1971), BAR RELIEF IN THIS CASE.

The State Attorney has commingled abstention, the anti-injunction statute (Title 28 U.S.C. §2283) and *Younger v. Harris*, 401 U.S. 37 (1971), in his argument that the decisions below were improper exercises of jurisdiction. None of those theories bar relief in this case.[20]

Abstention is a narrow doctrine properly utilized only when the state law "is susceptible of 'a construction by the state courts that would avoid or modify the [federal] constitutional question.'" *Lake Carriers Assoc. v. MacMullan*, 406 U.S. 498, 510 (1972). Those circumstances do not exist here. The Florida case law and rules

[19]Footnote 14, supra. See also Goldfarb, *Ransom*, Harper and Row, New York (1965).

[20]The Attorney General, in his Amicus Curiae Brief (pp. 12-16) asserts another jurisdictional issue. He contends that requiring preliminary hearings would allow an inferior court of Florida to overrule a higher court. No decision yet rendered has sought to delineate who should conduct preliminary hearings. Nor is such a determination sought here. All that is urged is that some judicial officer determine probable cause. Florida Statutes, §901.01 (as amended, 6 West Florida Session Laws, 1973 Chap. 73-334) provides that "each state judicial officer is a . . . committing magistrate." That provides sufficient flexibility to meet any contingency. The cases cited by the Attorney General are inapposite.

have never been ambiguous. They have been clear and consistent in their insistence that the Florida and Federal Constitutions are not offended by the use of an information in lieu of an impartial determination of probable cause by a judicial official. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972); *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); Rule 3.131(a), Florida Rules of Criminal Procedure.

Both the District Court opinion (332 F.Supp. at 1115) and the Fifth Circuit opinion (483 F.2d at 781-782) paid careful heed to *Younger*. Both Courts concluded, correctly, that the relief sought did not involve interference with pending or future prosecutions. *Fuentes v. Shevin*, 407 U.S. 67, 71, n. 3 (1972).

If *Younger v. Harris* were applicable, this case would fall within its exceptions. The Court in *Younger* said that no obstacle exists to an injunction when: (1) great and immediate irreparable injury is present; (2) Federal constitutional rights cannot be protected in State court and (3) the threatened constitutional deprivation cannot be eliminated by a single defense to the State prosecution. All of those circumstances exist here.

The loss of liberty constitutes great and immediate irreparable injury. The Florida law forecloses any constitutional challenge, either as a defense or by an equitable action, to the denial of a preliminary hearing. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972). Thus, the *Younger* exceptions are met. *Cf. Younger v. Harris*, 401 U.S. 37, 46 (1971).

VI.

PROVIDING PRELIMINARY HEARINGS WILL PROMOTE THE EFFICIENT ADMINISTRATION OF JUSTICE.

In addition to its value in protecting the individual against unfounded criminal charges, the preliminary hearing serves important governmental interests. It is an excellent screening device for determining which cases should or should not remain in the criminal justice system. Cases with insufficient evidence are promptly dismissed permitting trial courts to concentrate on the more serious matters.

Paulsen and Kadish, *Criminal Law and Its Processes* 920 Little, Brown & Co. (1962) note:

> "An enormous number of cases are eliminated by the preliminary examination. The Crime Surveys of the prohibition era found that in various states from 17 percent to 58 percent of all felony arrests failed to proceed beyond the preliminary examination stage. The cases are brought to an end at this early point by: (1) dismissal for want of prosecution, perhaps because witnesses failed to appear; (2) discharge for lack of probable cause; (3) filing of a nolle prosequi."

An American Bar Foundation study estimated that the clearance rate for felonies at the preliminary hearing stage was eighty percent in Chicago and sixty-five percent in Brooklyn, New York. McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1156 (1970). In the instant case, Judge Tanksley, Chief Judge of the Magistrate's Division of the Eleventh Judicial Circuit of Florida, estimated that the preliminary hearing system had reduced felony caseloads by twenty to twenty-five percent in Dade County, Florida. *Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir. 1973).

Prompt preliminary hearings also provide an excellent vehicle for early decisions on bail or release on personal recognizance. *Report on Courts*, National Advisory Commission on Criminal Justice Standards and Goals, Standard 4.5 (1973).

Moreover, the hearings bring the parties together at an early stage for plea bargaining purposes. Since counsel is required, *Coleman v. Alabama*, 399 U.S. 1 (1970), charges may be reduced or otherwise plea bargained at an early stage of the proceedings, rather than waiting until trial to achieve the same disposition. See, Katz, *Justice is the Crime: Pre-Trial Delay in Criminal Cases*, The Press of Case Western Reserve University, Cleveland and London, (1972), pp. 211-212.

Each of these benefits serves the public interest by promoting an efficient, economical administration of criminal justice. The public interest is also served, of course, by the protection which a preliminary hearing offers for the right to liberty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of brief for respondents was served by United States Mail upon Leonard Mellon, Esquire, Assistant State Attorney, 2070 Main Street, Sarasota, Florida; Joseph Durrant, State Attorney's Office, Metropolitan Justice Building, 1351 N.W. 12 Street, Miami, Florida and George R. Georgieff, Assistant Attorney General, Attorney General's Office, The Capitol, Tallahassee, Florida 32304, this 7 day of February, 1974.

BRUCE S. ROGOW

Counsel for Respondents

APPENDIX

PRELIMINARY HEARING PROVISIONS OF THE FIFTY STATES

ALABAMA–Code, 1940, Tit. 15, §133

ALASKA–Cr. R. 5(d)

ARIZONA–17 A.R.S. Rules of Criminal Procedure, Rule 5.1

ARKANSAS–Stat., 1964, Tit. 43, §43-603

CALIFORNIA–Penal Code, 1971, §859b

COLORADO–1 C.R.S. Rules of Criminal Procedure, Rule 5(c)

CONNECTICUT–C.G.S.A. §54-76a

DELAWARE–13A D.C.A. Rules of Criminal Procedure, Rule 5(c)

FLORIDA–Rules of Criminal Procedure, Rule 3.131

GEORGIA–Code, 1972, Tit. 27, §27-407

HAWAII–Rev. Stat., 1971, Tit. 37, §710-7

IDAHO–Code, 1973, Tit. 19, §19-804

ILLINOIS–S.H.A. Ch. 38, §109-3 (1963)

INDIANA–Burn's Ind. Stat. Ann., 1937, Tit. 9, §§704, 704a (1949)

IOWA–I.C.A. §761.1 (1939)

KANSAS–K.S.A., Art. 22, §22-2902 (1970)

KENTUCKY–7 K.R.S., Rules of Criminal Procedure, Rule 3.04

LOUISIANA–Code of Criminal Procedure, 1966, Tit. 7, Arts. 291, 292

MAINE–Rules of Criminal Procedure, Rule 5(c)

MARYLAND–Code, 1957, Art. 27, §592 (1973)

MASSACHUSETTS–M.G.L.A. Ch. 276, §§37A-42 (1959)

MICHIGAN–M.C.L.A. §766.1

MINNESOTA–M.S.A. §§628.31, 629.50

MISSISSIPPI–Code, 1942, Tit. 99, Ch. 15, §99-15-5

MISSOURI–V.A.MS. §544.250 (1972), Rules of Criminal Procedure, Rules 23.02, 23.03

MONTANA–Rev. Code, 1967, Tit. 95, §95-902

NEBRASKA–Rev. Stat., 1943, Ch. 29, §29-506

NEVADA–Rev. Stat., 1971, Tit. 14, Ch. 171, §171.196

NEW HAMPSHIRE–Rev. Stat., 1955, Ch. 596

NEW JERSEY–Rules Governing Criminal Practice, Rule 3:4-3

NEW MEXICO–Stat., 1972, Ch. 41, §41-23-20

NEW YORK–Code of Criminal Procedure §180.60 (McKinney 1971)

NORTH CAROLINA–Gen. Stat., Ch. 15, §15-87

NORTH DAKOTA–Century Code, 1943, Tit. 29, §§29-07-11, 29-07-18

OHIO–Rev. Code, Tit. 29, §§2937.10-2937.12 (1960) 2945.71 (1974)

OKLAHOMA–Const. Art. 2, §17, Laws, 1961, Tit. 22, §258

OREGON–O.R.S. 1963, Tit. 14, §§133.610, 133.810, 133.820

PENNSYLVANIA–Pa. R. Crim. P. 120

RHODE ISLAND–Gen. Laws, 1956 (1969 reenactment), Tit. 12, §12-10-5

SOUTH CAROLINA–Code, 1962, §§43-231, 43-232

SOUTH DAKOTA–S.D.C.L., 1967, Tit. 23, §§23-27-1 - 23-27-16

TENNESSEE–Code, 1971, §40-1131

TEXAS–Vernon's Ann. C.C.P. Art. 16.01

UTAH–U.C.A., 1953, Tit. 77, §77-15-3

VERMONT–Rule 5, Vermont Rules of Criminal Procedure

VIRGINIA–Code, 1950, Tit. 19, §19.1-101 (1968)

WASHINGTON–Rev. Code, Tit. 10, §§10.16.040 (1952), 10.16.080 (1954)

WEST VIRGINIA–Code, 1965, §62-1-8

WISCONSIN–U.S.A. §§970.03, 971.02 (1969)

WYOMING–Rules of Criminal Procedrue, Rule 7

NOT FINAL UNTIL FEBRUARY 15, 1974, AND IF REHEARING FILED, UNTIL SAID PETITION IS DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1974

IN RE:	
RULE 3.131(b), FLORIDA RULES OF CRIMINAL PROCEDURE	CASE NO. 44,958

Opinion filed February 4, 1974

A Case of original jurisdiction – Florida Rules of Criminal Procedure

PER CURIAM.

Under the present Rules of Criminal Procedure, every defendant charged with a non-capital offense is entitled to a preliminary hearing within 72 hours if he is in custody. The purpose of this provision was to speed the filing of information and thereby require the state attorney to determine, within 72 hours, whether a defendant will be prosecuted or should be released.

Before filing an information every state attorney should not only seek probable cause in his investigation, but also determine the possibility of proving the case beyond and to the exclusion of every reasonable doubt. If the latter cannot be accomplished, no information should be filed and the defendant should be released. The rule requiring this determination within 72 hours will result in the filing of some cases in which the state attorneys do not have a firm belief as to the integrity of the charge, or the state attorneys will be required to invoke a complete preliminary hearing system, with all its attendant costs and burdens upon the judicial system as well as the people of the state.

The state attorneys have requested that this rule be amended so that they will be allowed the period of 96 hours within which to complete their investigation of the case and determine whether to file an information or dismiss the charge. If the time is extended to 96 hours, the number of cases in which no information is filed will be increased and the number of cases in which a *nolle prosequi* of an information is entered will be reduced. The amendment will prevent charges from being filed against innocent people in cases where the state objectively could not prove the charges brought by the investigating law enforcement agency.

In an effort to expedite the dismissal of unwarranted charges brought against innocent citizens and in an effort to facilitate the operation of the criminal justice system with least inconvenience to the citizen, Rule 3.131(b) is hereby amended so that the same shall read as follows:

RULE 3.131. PRELIMIN^RY HEARING

* * *

(b) In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 96 hours from the time of the defendant's first appearance. In all capital offenses and offenses punishable by life imprisonment, the preliminary hearing shall be held within seven days of the time of the defendant's first appearance. Should the charges as set forth in paragraph (a) of this rule not be filed, or the preliminary hearing as set forth in this paragraph not be held within the time period herein specified, then the court shall release the defendant on a personal surety bond, without the necessity of additional surety signing thereon, together with such other conditions as to the court may seem just and proper under the circumstances.

This rule shall take effect on March 1, 1974.

It is so ordered.

CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., Concur
ERVIN, J., Dissents with opinion
BOYD, J., Dissents

ERVIN, J., dissenting:

This postponement by rule for yet another twenty-four hours (increasing the time to four days) within which preliminary hearings must be afforded uncharged accuseds held in custody is yet another retreat from the modern view that deprivation of an accused's liberty should not be unduly prolonged by the slowness of the prosecutorial machinery. Originally it was provided in the American Bar Association's proposed Minimum Standards for Criminal Justice that the time of such detention in custody of accused felons for crimes less than capital and misdemeanants should be only twenty-four hours.

This further postponement of the time during which an accused may be held in custody for prosecutorial investigation—after the arresting officer has made the arrest—compounds an already undue length of time for state action. An accused is entitled to an expeditious determination of whether there is probable cause for charging him and holding him in further custody.

This modification is but another imposition upon poor people unable to secure bail upon arrest. It is a relaxive indication there is to be no incentive for speeding up of the state procedures for determining whether accuseds should be further detained. It is contrary to the spirit of the Constitution for early release of the innocent and the speedy charging and prosecution of the guilty.